

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4 August Term, 2013

5 (Argued: February 19, 2014 Decided: September 3, 2014)

6 Docket No. 13-1031

7 _____
8 UNITED STATES OF AMERICA,

9 Appellee,

10
11 - v. -

12 LYUBOV GROYSMAN,

13 Defendant-Appellant.
14 _____

15 Before: KEARSE, WINTER, and WESLEY, Circuit Judges.

16 Appeal from a judgment of the United States District Court for the Eastern District of
17 New York, Sterling Johnson, Jr., Judge, convicting defendant of conspiring to commit health care
18 fraud, see 18 U.S.C. § 1349, and to engage in money laundering, see 18 U.S.C. §§ 1956(h),
19 1956(a)(1)(A)(i), and 1956(a)(1)(B)(i). Defendant contends principally that the government's main
20 witness was allowed to give testimony that included inadmissible hearsay and inadmissible opinions,
21 and to lay the foundation, without personal knowledge, for the admission of government charts that
22 were inadmissible, inaccurate, and misleading. The government concedes these errors but contends
23 that they either were harmless or were not so harmful as to meet the standard for plain error.

24 Vacated and remanded for a new trial.

1 MICHAEL H. WARREN, Assistant United States Attorney,
2 Brooklyn, New York (Loretta E. Lynch, United States
3 Attorney for the Eastern District of New York, Amy
4 Busa, Assistant United States Attorney, Brooklyn, New
5 York, on the brief), for Appellee.

6 MAURICE H. SERCARZ, New York, New York (Sercarz &
7 Riopelle, New York, New York), for Defendant-
8 Appellant.

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10 KEARSE, Circuit Judge:

11 Defendant Lyubov Groysman (or "Groysman" or "Lyubov") appeals from a judgment
12 entered in the United States District Court for the Eastern District of New York, following a jury trial
13 before Sterling Johnson, Jr., Judge, convicting her of conspiring to commit health care fraud, in
14 violation of 18 U.S.C. § 1349, and conspiring to commit money laundering, in violation of 18 U.S.C.
15 §§ 1956(h), 1956(a)(1)(A)(i), and 1956(a)(1)(B)(i). Groysman was sentenced principally to 97
16 months' imprisonment, to be followed by a three-year term of supervised release, and was ordered to
17 forfeit \$100,000. On appeal, she contends principally that the main government witness gave
18 testimony that included inadmissible hearsay and inadmissible opinions, and was allowed, without
19 personal knowledge, to provide the foundation for the admission of seven government exhibits ("GX")
20 that were not admissible under the Federal Rules of Evidence and that were inaccurate and
21 misleading. The government concedes these errors but contends that they either were harmless or
22 were not so harmful as to meet the standard for plain error. Finding admission of the challenged
23 exhibits and much of the main government witness's testimony seriously prejudicial error, we
24 conclude that Groysman's conviction should be vacated and her case remanded for a new trial. In
25 light of this decision, we need not reach other arguments made by Groysman on this appeal.

1 I. BACKGROUND

2 The present prosecution arose out of an investigation by the Federal Bureau of
3 Investigation ("FBI"), the Department of Homeland Security ("DHS"), the Internal Revenue Service
4 ("IRS"), and the New York City Police Department ("NYPD") into schemes by suppliers of durable
5 medical equipment (or "DME"), such as neck braces, knee supports, and bed boards prescribed for
6 patients, to submit fraudulent reimbursement claims to insurance companies. In this type of scheme,
7 a DME retailer would procure from a wholesaler an invoice that bore inflated prices for the listed
8 equipment and give the wholesaler a check for the total; the retailer would bill an insurance company
9 for the inflated total; and the wholesaler would return to the retailer part of the difference between the
10 stated price and the actual amount paid by the retailer.

11 The government's investigation resulted in the June 2010 arrests and indictment of
12 numerous persons, including Groysman. Groysman and one codefendant, Vladimir Khmel'nitski, were
13 tried together on the two-count indictment charging health care fraud conspiracy and money
14 laundering conspiracy. At their 11-day trial, the government called nine witnesses whose testimony
15 related to Groysman (or to the companies by which she was employed), including two cooperating
16 witnesses (the "cooperators" or "informants"): Grigory Groysman (or "Grigory G."), who is not
17 related to Lyubov Groysman, and Vadim Yuzovitskiy. The government's main witness was DHS
18 Special Agent Semyon Ginzburg, who had run the latter stages of the investigation and who testified
19 on the first four days of trial attended by the jury.

1 A. The Testimony of Special Agent Ginzburg

2 Agent Ginzburg testified that he became involved in the health care fraud investigation
3 into DME companies in January 2010. Prior to his involvement, Grigory G. and Yuzovitskiy, DME
4 wholesalers who had long been engaging in fraudulent schemes, had learned that a participant in their
5 DME schemes had been arrested, and they had voluntarily surrendered to federal authorities and
6 agreed to assist in the investigation. After Ginzburg became involved, he conducted a "street
7 operation" by having the cooperators--monitored by himself and others--continue their dealings with
8 suspects but with the goal of collecting evidence for the authorities.

9 All conversations on the cooperators' telephone lines were recorded. And initially, for
10 face-to-face meetings with the suspects, the cooperators were outfitted with audio recording devices.
11 Eventually, the cooperators were equipped with hidden cameras that provided video recordings with
12 audio--although Ginzburg testified that the video aspect did "[n]ot [work] too well." (Trial Transcript
13 ("Tr.") at 57-58.)

14 The conversations between cooperators and suspects were usually in Russian. (See,
15 e.g., id. at 68.) Ginzburg testified that his native language was Russian; that he was raised in the
16 former U.S.S.R. until he came to the United States at about age 18; that his primary language at home
17 and in social situations has remained Russian; and that he had been trained to translate between
18 Russian and English and had passed tests given by the FBI, NYPD, and DHS for such translations.
19 (See id. at 38-39.) Ginzburg testified that he reviewed translations of the cooperators' conversations
20 with the suspects, and he "personally transcribed at least the final transcriptions of . . . [the] meetings
21 and telephone recordings." (Id. at 60.) At trial, the government introduced transcripts of recorded
22 conversations between Groysman and Grigory G. or Yuzovitskiy, as well as videotapes of some of
23 their meetings.

1 Groysman's position with respect to the charges against her was that she was merely
2 a part-time worker at EGA Group, Inc. ("EGA"); that she helped with billing because she knew how
3 to use the computer; and that she was not getting paid and was unaware of the DME fraudulent
4 scheme. (See, e.g., id. at 314-15, 317 (Ginzburg's description of his postarrest interview of
5 Groysman); see also Government brief on appeal at 4 ("At trial, Groysman's defense was that she was
6 a part-time worker at EGA who had been following the direction of one of EGA's owners, Gregori
7 [sic] Branfenbrener, without knowledge of the scheme or the criminal intent to participate in it.").)

8 Ginzburg's testimony at trial with respect to Groysman included the following.
9 Groysman, along with codefendant Grigory Branfenbrener ("Branfenbrener") who had pleaded guilty
10 prior to trial (see Government brief on appeal at 4 n.2), worked at two DME retail companies, first
11 Leica Supply Inc. ("Leica"), and then EGA. Ginzburg testified that Groysman or Branfenbrener
12 would give one of the cooperators a document that the government dubbed a "go-by" (see, e.g.,
13 Tr. 335; see also id. at 544 ("go-buy")). The go-by listed the types of equipment that EGA supposedly
14 wanted to buy from the wholesaler, the quantity of each item, and a highly inflated price per item.
15 For example, bed boards that cost \$10-\$12 were listed as costing \$92; home whirlpools that cost
16 \$30-\$32 were listed as costing \$380. (See, e.g., id. at 223, 244-45.) Ginzburg instructed the
17 cooperators to prepare invoices to match the information EGA provided in the go-bys.

18 The go-bys were generally accompanied or followed by EGA "checks [that] would
19 come from Ms. Groysman and Gregory [sic] Branfenbrener." (Id. at 66.) The EGA checks were
20 deposited into an account of one of the cooperators' fictitious wholesale companies, usually one
21 named "Delazoom." Delazoom then issued a corresponding check to a shell company, and that check
22 was cashed. After the check casher retained a small fee, all or most of the rest of the cash was divided

1 among the defendants and their retail companies and the cooperators. In some instances, a small
2 portion of the money would be used to purchase equipment.

3 Ginzburg testified that he monitored the operation in part by meeting with the
4 cooperators before and after their face-to-face meetings with the suspects (see Tr. 68), and by
5 controlling the deposits of the checks, the withdrawal of cash, and the "delivery of the cash to the
6 defendant" (id.). Ginzburg attended none of the cooperators' meetings at EGA and could not see
7 through the windows. (See, e.g., id. at 195-96, 256.) The only witnesses who had "actual knowledge
8 of what [Groysman] did" were "the informants" (id. at 356-57); Ginzburg's knowledge of what took
9 place at those meetings came from what he could hear through the audio equipment, from what he
10 learned by reviewing the recordings, and from "the debriefing of the informant[s]" (id. at 196).

11 Ginzburg testified that EGA would bill insurance companies for the items it claimed
12 to have purchased at the prices shown on the invoices provided by the cooperators and that the
13 insurance companies would then reimburse EGA for the DME. The government introduced a chart,
14 GX 75, prepared at the direction of Ginzburg, that provided a general summary of the fraudulent
15 health care scheme by giving a "visual description of the scheme that EGA was running with the
16 informant" (Tr. 303). Circles on the chart contained the names or titles of relevant entities or
17 documents, and arrows pointed from circle to circle to show the movements of documents and checks.
18 As described by Ginzburg, GX 75 showed that "[t]he go bys were received predominantly from
19 defendant Groysman to Delazoom. The false invoices were generated based on those go bys and
20 brought back to the defendant Groysman." (Tr. 307.) Ginzburg testified that after Groysman gave
21 the cooperators EGA checks payable to Delazoom, "the resulting cash would go back minus the
22 kickback and minus any cost of DME predominantly to Grigory Branfenbrener and at least on one

1 occasion the defendant Groysman." (Id.) GX 75 also suggested that EGA's inflated claims to the
2 insurers were paid as submitted. The exhibit was admitted in evidence over Groysman's objection
3 that, inter alia, that suggestion was inaccurate and misleading.

4 Seven other exhibits introduced by the government, GX 59-65, were charts prepared
5 at Ginzburg's direction to depict numerous meetings between Groysman and Yuzovitskiy or
6 Grigory G., with boxes and arrows to show checks given to Yuzovitskiy or Grigory G. and cash
7 flowing back to Groysman. Groysman's objection that these exhibits were improperly being used as
8 actual evidence rather than for purely illustrative purposes was overruled. (See Tr. 104.) Most of
9 these charts were admitted over Groysman's additional objections after her counsel elicited on voir
10 dire that the charts were based on what the informants told Ginzburg, rather than on Ginzburg's
11 personal knowledge or observations (see, e.g., id. at 195-98, 207-08, 233-35, 294-97). And certain
12 of the charts were admitted over Groysman's objection that they were inaccurate or contained
13 information that was misleading. (See id. at 251-53, 210-13.) Six of the charts indicated that after
14 Groysman had given Yuzovitskiy or Grigory G. a go-by, cash was returned either to Groysman and
15 Branfenbrener or just to Groysman. (See GX 59, 60, 61, 63, 64, 65.)

16 Ginzburg summarized Groysman's role in the DME scheme as follows:

17 Q. Based on the street operation, based on the recorded meetings and
18 telephone calls that you obtained and preserved in this investigation, what role
19 did [Groysman] play in EGA office between January and June of 2010?

20 A. She provided the go-buys for the false invoices, received false
21 invoices based on those go-buys, provided checks and received cash at least
22 once.

23 (Tr. 544.)

1 B. Testimony by the Cooperators

2 Both cooperators testified at trial. Grigory G. testified that he and Yuzovitskiy were
3 partners operating fictitious DME wholesalers. Grigory G. testified that Groysman and Khmel'nitski--
4 who, although being tried together, were not shown to have interacted with each other in the DME
5 scheme--were "my partners in criminal activities. We were doing money laundering and insurance
6 fraud." (Tr. 598.)

7 Grigory G. testified that EGA and Leica, the companies that employed Groysman, were
8 retailer clients of Grigory G. and Yuzovitskiy in the DME scheme. Grigory G. testified that he, either
9 alone or with Yuzovitskiy, drove to the office of EGA or Leica dozens of times; however, usually
10 Yuzovitskiy went into the office alone. Grigory G. went into the EGA office only six or seven times.
11 When Grigory G. himself went in, "everything" he received with respect to the fictitious invoices
12 came "from Lyubov Groysman" (id. at 659).

13 Grigory G. testified that when he returned cash to EGA, the amount returned was the
14 amount of the check the cooperators had received from EGA minus five percent as the standard fee
15 for the entity that cashed the check, a six percent fee for the cooperators, and the cost of DME actually
16 supplied to EGA, if any. (See id. at 608-09; see also id. at 734 (similar testimony by Yuzovitskiy as
17 to the division of the scheme's proceeds).) Thus, where no equipment was actually purchased, EGA
18 would receive in cash 89 percent of the amount it had given a cooperator.

19 Grigory G. testified that on March 18, 2010, he returned such cash to Groysman. The
20 transcript of the audio portion of the recording on that day, translated from Russian and using "LG"
21 for Groysman and "GG" for Grigory G., included the following:

1 GG: Take it.

2 LG: Thank you, uh-huh. Yes.

3 GG: It has this and that.

4 (GX 2-10, at 2.) At trial, Grigory G. explained this exchange as follows:

5 Q. What were you referring to when you said "and this and that"?

6 A. Invoice and cash.

7 Q. Do you recall what the purpose of the cash was?

8 A. It was the cash for the check that had been given prior to that.

9 (Tr. 664.)

10 Yuzovitskiy testified that his role in the scheme was to prepare the fictitious invoices
11 for the retailers. For the information that was to be shown on those invoices for EGA, Yuzovitskiy
12 received go-bys from Groysman. (See id. at 744, 959.) The fictitious invoices were then reviewed
13 by Groysman, and errors were called to Yuzovitskiy's attention by Groysman. (See id. at 853-55; see
14 also id. at 659, 663-64 (testimony by Grigory G. that Groysman also called such an error to his
15 attention so that he could have Yuzovitskiy provide a corrected fictitious invoice).) Yuzovitskiy
16 testified that the EGA checks corresponding to the go-bys, made out to one of the cooperators'
17 wholesale companies, were signed by Branfenbrener "but Lyubov Groysman issued the check." (Id.
18 at 745.)

19 Yuzovitskiy testified that he also "ha[d] discussions with Lyubov Groysman with
20 regard to the cash deliveries that [he] would make to EGA and Leica"; he testified that "[s]he would
21 ask me when the money will be coming." (Id. at 958-59.) However, Yuzovitskiy testified that
22 "99 percent of the time" he delivered the cash to Branfenbrener. (Id. at 958.) Indeed, on questioning
23 by the government, Yuzovitskiy testified that he did not remember ever giving cash to Groysman:

1 Q. Did you ever, ever deliver cash to Lyubov Groysman?

2 A. I don't remember if it ever happened. But most of the time I would
3 leave it in the drawer, in the Branfenbrener desk drawer. But I don't remember
4 that I gave cash directly to Lyubov.

5 (Tr. 958 (emphases added).)

6 Both Grigory G. and Yuzovitskiy testified that they had been involved in the DME
7 schemes prior to voluntarily turning themselves in and agreeing to assist the government in the
8 investigation that led to the present prosecution. Grigory G. testified that he was currently awaiting
9 sentencing for money laundering, insurance fraud, and tax evasion, having pleaded guilty to those
10 charges. He agreed to cooperate with the government in the present investigation and to be a witness
11 at trial in hopes of getting a reduced sentence. (See id. at 688.) Yuzovitskiy similarly testified that
12 he had turned himself in and decided to cooperate with the government because he was afraid that he
13 was about to be arrested. (See id. at 900-01.) He too had pleaded guilty to money laundering,
14 insurance fraud, and tax evasion and was awaiting sentencing. He hoped, by his cooperation, to
15 secure a lighter sentence. (See id. at 902-03.)

16 Both cooperators also testified that they had been ensnared in a prior fraud
17 investigation by New York State authorities and had cooperated with the authorities in that matter.
18 Grigory G. testified that he had been investigated by state authorities in 2004 and 2005; he had
19 avoided prosecution by assisting in their investigation, including by recording conversations with his
20 then-coconspirators. (See id. at 688-89.) Yuzovitskiy testified that he had participated in Grigory G.'s
21 2004-2005 frauds, and he too cooperated with the state authorities. In exchange for that cooperation,
22 neither Grigory G. nor Yuzovitskiy was arrested, charged, prosecuted, or required to make payments
23 of back taxes. (See id. at 897-99.)

1 Yuzovitskiy testified that as soon as that state investigation ended, he and Grigory G.
2 resumed business as usual. They never went out of business. They just closed their old office and
3 "continued doing fraud as [they] did before," "at a new address." (Id. at 898; see also id. at 622-23
4 (testimony by Grigory G. that he had started the criminal DME wholesale business in 2001, and it
5 continued for nine years).) Yuzovitskiy testified that in all their operations together, he and
6 Grigory G. never had any clients that were running "legitimate retail durable medical equipment
7 companies." (Id. at 791.)

8 C. Other Government Witnesses

9 The government's other trial witnesses whose testimony related to EGA were an IRS
10 special agent and an FBI special agent who had analyzed documents in connection with the health
11 care fraud investigation; an IRS special agent who was involved in executing a search warrant at
12 EGA's office; two investigators employed by insurance companies; and a DME wholesale distributor.
13 None of these witnesses provided evidence about Groysman personally.

14 D. Groysman's Defense Case

15 Groysman called three witnesses in her defense, including two character witnesses.
16 Her fact witness was Yelena Panchenko, a longtime friend who had been a coworker at EGA for six
17 or seven months, beginning in 2009 and ending in June 2010 when the arrests occurred. Panchenko
18 worked part-time at EGA as a clerk, doing billing.

19 Panchenko testified that Groysman was not an owner of EGA; "E" "G" and "A" were
20 the initials of the first names of the three owners, including Grigory Branfenbrener. She testified that

1 Groysman, like Panchenko, was a clerk at EGA (see Tr. 1211), and she believed Groysman too
2 worked part-time (see id. at 1210). Groysman "was doing the mail" (id. at 1209), sorting it and
3 sometimes responding to insurance company requests for additional information (see id. at 1209-10).

4 Panchenko testified that one of EGA's suppliers was Yuzovitskiy and that the accuracy
5 of the invoices they received from him was "[t]errible. . . . Every time they would bring up the
6 invoice it was always mistake." (Id. at 1212.) Invoice errors made it difficult to receive
7 reimbursement from the insurance companies. Panchenko testified that eventually, to address the
8 problem with Yuzovitskiy's invoices, Branfenbrener "would dictate to us the names and quantities"
9 for an order. (Id.) As to prices, Panchenko testified that "[e]verything was in the computer and the
10 computer did it automatically." (Id. at 1270.)

11 Panchenko testified that on a few occasions Yuzovitskiy delivered a sealed envelope
12 to EGA's offices; Panchenko would usually put it on Branfenbrener's desk. She never saw cash in an
13 envelope and never saw Yuzovitskiy or Grigory G.--or any wholesaler--give cash to Branfenbrener
14 or Groysman. (See id. at 1213-14.)

15 E. Summation and Verdict

16 In summation, the government argued that the evidence demonstrated that Groysman
17 knowingly entered into and participated in the fraudulent scheme alleged. In discussing the testimony
18 of the cooperating witnesses, the government stated in part as follows:

19 We put on two cooperating witnesses. The government witnesses
20 Grigory Groysman came first and then Vadim Yuzovitskiy.

21 Now let's talk for a second about what those cooperators are not. They
22 are not boy scouts. They are not altar boys. They're criminals. They are
23 individuals who came forward to the government and identified themselves as

1 having been part of this scheme and as furthering this scheme and they wanted
2 to cooperate, motivated in their own self interest of hoping to some day get
3 leniency. They're not angels.

4

5 . . . I said, you know, they weren't angels, but what they were and what
6 they are was consistent, credible and corroborated.

7 I mean, they went into these meetings and they essentially operated as
8 walking, talking, videographers. I mean, their video was no Steven Spielberg
9 most of the time, but we have on tape documents that are incriminating,
10 documents that are furthering the fraud, statements that are made by the
11 defendants in furtherance of the fraud over and over and over again.

12 You can trust the testimony that came from Vadim Yuzovitskiy and
13 Grigory Groysman because it was consistent and it was corroborated and every
14 time they went into a meeting with one of the defendants, they met with an
15 agent before they went in, they met with an agent when they came out and you
16 heard from that agent. So you can trust that testimony.

17 (Tr. 1306-07 (emphases added).)

18 Groysman was convicted on both of the counts with which she was charged. She was
19 sentenced as indicated above.

20 II. DISCUSSION

21 On appeal, Groysman contends principally that Ginzburg's testimony was replete with
22 inadmissible hearsay, as he recounted factual matter as to conduct by Groysman that he could not
23 have learned except from statements by the cooperators; that Ginzburg was improperly allowed to
24 give his opinion as to Groysman's culpability; that Ginzburg was allowed to give foundation
25 testimony for the admission of documents as to whose accuracy he had no personal knowledge; and
26 that seven charts introduced by the government showing go-bys from Groysman to Yuzovitskiy or

1 Grigory G.--six of which indicated cash was given by Yuzovitskiy or Grigory G. to Groysman--were
2 not admissible under the Federal Rules of Evidence and were inaccurate and misleading. Groysman
3 concedes that some of her present objections to Ginzburg's testimony or to those charts were not made
4 at trial. She contends, however, that the errors to which she objected were not harmless and that those
5 to which she did not previously object warrant reversal on the ground of plain error. We conclude
6 that given the serious impropriety of the prosecution's use of this witness in light of the record as a
7 whole, the evidentiary errors of which Groysman complains on appeal--which, along with others, are
8 admitted by the government as described below--meet the standard for plain error review and require
9 that Groysman be given a new trial.

10 Preliminarily, we note the principal differences between harmless-error analysis and
11 plain-error analysis. In conducting harmless-error analysis, applicable when an error claimed on
12 appeal has been properly preserved in the district court, we consider "(1) the overall strength of the
13 prosecutor's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3)
14 the importance of the wrongly admitted testimony; and (4) whether such evidence was cumulative of
15 other properly admitted evidence." United States v. Gomez, 617 F.3d 88, 95 (2d Cir. 2010) (internal
16 quotation marks omitted). Conducting harmless-error analysis, we will reverse a conviction on the
17 basis of improperly admitted evidence "only if [the] error affects a substantial right." United States
18 v. Garcia, 413 F.3d 201, 210 (2d Cir. 2005) (internal quotation marks omitted). The Federal Rules
19 of Criminal Procedure ("Criminal Rules") provide that any error "that does not affect substantial rights
20 must be disregarded." Fed. R. Crim. P. 52(a). "An evidentiary error affects substantial rights if it had
21 a substantial and injurious effect or influence on the jury's verdict." United States v. Garcia, 413 F.3d
22 at 210 (internal quotation marks omitted). "An error is harmless if we can conclude with fair

1 assurance that the evidence did not substantially influence the jury." Cameron v. City of New York,
2 598 F.3d 50, 61 (2d Cir. 2010) (internal quotation marks omitted). With respect to harmless-error
3 analysis, the government bears the burden of proof. See, e.g., United States v. Kaiser, 609 F.3d 556,
4 573 (2d Cir. 2010).

5 The Criminal Rules also provide that "[a] plain error that affects substantial rights may
6 be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). Under
7 this Rule,

8 before an appellate court can correct an error not raised at trial, there must be
9 (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." If all
10 three conditions are met, an appellate court may then exercise its discretion to
11 notice a forfeited error, but only if (4) the error "seriously affect[s] the fairness,
12 integrity, or public reputation of judicial proceedings."

13 Johnson v. United States, 520 U.S. 461, 466-67 (1997) (quoting United States v. Olano, 507 U.S. 725,
14 732 (1993) (other internal quotation marks omitted)). An error affects substantial rights when it is
15 prejudicial--that is, when there is a "reasonable probability" that the error affected the outcome of the
16 trial. United States v. Dominguez Benitez, 542 U.S. 74, 81-82 (2004). The burden of meeting the
17 above criteria for plain-error review is on the defendant. See, e.g., id. at 82. The government may
18 point to parts of the record in an effort to counter any ostensible showing of prejudice the defendant
19 may make. See, e.g., United States v. Young, 470 U.S. 1, 16 (1985).

20 In the present case, given the numerous errors conceded by the government and the
21 fact that not all of them were the subject of objections by Groysman at trial, we elect to bypass
22 harmless-error analysis and to conduct only plain-error analysis notwithstanding that the burden under
23 that analysis is on Groysman, because we conclude, on the present record as a whole, that she meets

1 the burden. The first two criteria for relief under the test for plain error are clearly met. There were
2 errors and they were plain. The government in its brief on appeal concedes as follows:

3 Groysman challenges three aspects of Agent Ginzburg's testimony: (1)
4 Ginzburg's incorporation of hearsay from the cooperators who later testified
5 at trial, (2) the inadequate foundation during his testimony for the admission
6 of summary charts, and (3) Ginzburg's inappropriate opinion testimony
7 relating to Groysman's role in the charged fraudulent scheme. . . . While
8 Groysman is correct that the government improperly admitted [sic] several
9 aspects of Ginzburg's testimony, ultimately, as explained below, any error in
10 the admission of this testimony was harmless in light of the strength of the
11 other evidence offered at trial.

12 First, to the extent that Ginzburg described what occurred at meetings
13 inside EGA offices, he was conveying information that he learned from
14 debriefing the cooperators and was thus conveying inadmissible hearsay. Fed.
15 R. Evid. 801(c)(1).

16 Second, to the extent that Ginzburg interpreted recorded conversations
17 involving the cooperators, Groysman and Branfenbrener, or opined upon
18 Groysman's role in the charged conspiracy, he was providing inadmissible
19 opinion testimony. United States v. Garcia, 413 F.3d 201, 210 (2d Cir. 2005);
20 United States v. Grinage, 390 F.3d 746, 749-51 (2d Cir. 2004) (lay opinion);
21 United States v. Dukagjini, 326 F.3d 45, 54 (2d Cir. 2003) (expert opinion).

22 Further, as counsel properly objected to all but one of the charts below,
23 to the extent that Ginzburg provided a foundation for the admission of
24 Government Exhibits 59 through 65, he had no personal knowledge of many
25 of the matters conveyed on those exhibits. Compounding the lack of
26 foundation for the admission of the summary exhibits, as counsel had further
27 objected below, the exhibits contained inaccurate and misleading information,
28 further rendering them inadmissible. United States v. Citron, 783 F.2d 307,
29 316 (2d Cir. 1986).

30 More fundamentally, however, these charts were not "summary charts"
31 as contemplated by Fed. R. Evid. 1006. Government Exhibits 59 through 65
32 do not summarize "voluminous writings, recordings, or photographs." Id.
33 Instead they appear to be pictorial representations of hearsay testimony offered
34 through Agent Ginzburg and of events and transactions later described by the
35 two cooperators. As such, the exhibits are no more admissible than any other
36 extrinsic writing memorializing the substance of a witness's testimony.FN27.

1 27. In addition, although not raised in Groysman's brief, it
2 appears that GX 75, a chart that generally summarized the scheme, was
3 erroneously admitted for similar reasons and was also inaccurate to the
4 extent it suggested that all claims that were submitted by EGA were
5 paid by insurance companies without any rejections or inquiries, as
6 counsel had objected below. (T 303-06). Using GX 75, Ginzburg
7 described, without objection, a summary of the scheme, including
8 opining that Groysman had provided the "go-bys" to Delazoom, which
9 prepared false invoices on the basis of the "go-bys," which, in turn,
10 were delivered to Groysman. (T 307). Ginzburg further indicated that
11 after the cooperators cashed the checks received from EGA, they
12 returned the cash, less their fee and expenses, primarily to
13 Branfenbrener but at least once to Groysman. (T 307). While this
14 testimony improperly relayed hearsay from the cooperators, it too was
15 harmless for the reasons explained below.

16 Further, these depictions may have also constituted a degree of improper
17 bolstering of the cooperators.

18 (Government brief on appeal at 41-43 & n.27 (emphases added).) "Groysman's complaints regarding
19 the admission of the evidence challenged herein are well founded" (Id. at 51.)

20 The third plain-error analysis factor, whether the errors affected Groysman's substantial
21 rights, i.e., whether there is a reasonable probability that, absent the erroneously admitted evidence,
22 the jury would not have found Groysman guilty, is not conceded by the government, but we conclude
23 for the reasons that follow that that factor too is established. "The reasonable-probability standard
24 is not the same as, and should not be confused with, a requirement that a defendant prove by a
25 preponderance of the evidence that but for error things would have been different." Dominguez
26 Benitez, 542 U.S. at 83 n.9. "The question is not whether the defendant would more likely than not
27 have received a different verdict . . . but whether . . . [despite the error] he received a fair trial,
28 understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a
29 different result is accordingly shown when the government's [error] undermines confidence in the
30 outcome of the trial." Kyles v. Whitley, 514 U.S. 419, 434 (1995) (internal quotation marks omitted).

1 The government, in its brief on appeal, characterizes its trial evidence "excluding
2 Ginzburg's testimony, [as strong, if not overwhelming." (Government brief on appeal at 45.) It
3 argues that

4 both cooperators directly implicated Groysman in the charged crimes and were
5 corroborated by their contemporaneous consensual recordings and the
6 documentary evidence reflecting the gross price disparities between the cost
7 of the DME to EGA and the amount that EGA billed to the insurance
8 companies,

9 (*id.*) and that "[t]hus, the 'inadmissible aspects of [Ginzburg's] testimony, viewed in relation to the
10 prosecution's formidable array of admissible evidence, was merely corroborative and cumulative" (*id.*
11 (quoting United States v. Dukagjini, 326 F.3d 45, 62 (2d Cir. 2002))).

12 On the contrary, we find the government's entire strategy was dependent on, and
13 tainted by, the egregious errors that the government now admits. These errors, discussed in more
14 detail below, so infected the fairness of the trial that Groysman's conviction would have been
15 overturned in all but perhaps the most airtight of cases. Specifically, the prosecution chose to lead
16 with Ginzburg's testimony, which gave a coherent, and superficially reliable, narrative of the
17 government's version of Groysman's participation in the fraudulent scheme. It was the equivalent of
18 an opening argument or summation by the prosecution but was presented as evidence for the jury to
19 consider. The charts, graphically displaying purported "facts" Ginzburg had "verified," compounded
20 the error. With this in place, the jury was all but invited to fall asleep during the admissible but messy
21 evidence of wrongdoing, *i.e.*, the garbled audio-video evidence and credibility-challenged testimony
22 of the cooperators.

23 Before delving into the individual weaknesses of the government's case, we issue a
24 word of caution: The errors admitted to in this case bordered on the structural, and the government

1 should not hope to overcome similar lapses in the future by the marshalling of a slightly stronger case.
2 See United States v. Yakobowicz, 427 F.3d 144, 150, 154 (2d Cir. 2005) (Interim summations that
3 the prosecution used to "not only state[] what the particular witness . . . said but also argue[] the
4 inferences to be drawn by the jury" constituted "a structural error requiring reversal."). Viewed in the
5 context of the trial strategy as a whole, Ginzburg's testimony was used to essentially vouch for the
6 admissible evidence offered by the prosecution. This tactic, whether engaged in by a prosecutor or
7 other government agent, has been repeatedly condemned. See, e.g., United States v. Modica, 663 F.2d
8 1173, 1178-79 (2d Cir. 1981) ("This Court has repeatedly warned prosecutors not to vouch for their
9 witnesses' truthfulness," and "[t]he policies underlying this proscription go to the heart of a fair
10 trial. . . . [W]hen the prosecutor conveys to the jurors his personal view that a witness spoke the truth,
11 it may be difficult for them to ignore his views, however biased and baseless they may in fact be.");
12 United States v. Perez, 144 F.3d 204, 210 (2d Cir. 1998) ("Attorney statements vouching for the
13 credibility of witnesses are generally improper because they 'impl[y] the existence of extraneous
14 proof'" (quoting United States v. Rivera, 22 F.3d 430, 438 (2d Cir. 1994))); United States v. Young,
15 745 F.2d 733, 766 (2d Cir. 1984) (Newman, J., concurring) (The "risk [of undue reliance on the
16 testimony of a government agent] arises because the jury may infer that the agent's opinion about the
17 criminal nature of the defendant's activity is based on knowledge of the defendant beyond the
18 evidence at trial. The risk is increased when the opinion is given by 'the very officers who were in
19 charge of the investigation.'" (quoting United States v. Sette, 334 F.2d 267, 269 (2d Cir. 1964)));
20 United States v. Scop, 846 F.2d 135, 142 (2d Cir. 1988) (A government investigator's testimony that
21 was "based on his positive assessment of the trustworthiness and accuracy of the testimony of the
22 government's witnesses" improperly "opine[d] as to the credibility of the testimony of other witnesses

1 at the trial." "The credibility of witnesses is exclusively for the determination by the jury . . ."). The
2 cumulative and strategic effect of the inadmissible evidence proffered by the government in this case,
3 even separate from other, individual deficiencies, thus went to the heart of a fair trial.

4 From the outset of the prosecution, Groysman's claim was that she had merely been
5 following instructions given by Branfenbrener, without knowing of or intending to participate in the
6 fraudulent scheme. As indicated in Part I.A. above, Ginzburg testified that Groysman took this
7 position when he interviewed her following her arrest. At trial, Groysman's attorney's opening
8 statement argued that the invoices were erroneous "unbeknownst to [Groysman]" (Tr. 23) and that
9 there would be no evidence that Groysman "received money or saw money being exchanged" (*id.*
10 at 25). And as set out in Part I.D. above, Groysman called as a witness Panchenko, who worked part-
11 time at EGA during the entire period of Ginzburg's street operation and who testified that the details
12 on the lists that EGA gave Yuzovitskiy for his preparation of invoices were dictated by
13 Branfenbrener. Thus, the government set out to prove that Groysman was a knowing participant in
14 the fraudulent scheme by, in part, presenting evidence that she received cash kickbacks. Most of the
15 evidence that the government caused to be admitted for this purpose was inadmissible; and, as
16 discussed below, the single bit of admissible direct evidence that Groysman received such a cash
17 kickback--testimony by Grigory G.--was not corroborated.

18 The government began by having Ginzburg testify, implicitly and explicitly, that
19 Groysman received such cash. (*See, e.g.*, Tr. 68 (Ginzburg's testimony that he monitored the street
20 operation by controlling, *inter alia*, "delivery of the cash to the defendant"); *id.* at 307 ("the resulting
21 cash would go back minus the kickback and minus any cost of DME . . . to . . . at least on one
22 occasion the defendant Groysman"); *id.* at 544 ("She . . . received cash at least once.")) Ginzburg,

1 however, had no personal knowledge of "what occurred at meetings inside EGA offices" and was
2 conveying "inadmissible hearsay" information obtained by "debriefing the cooperators."
3 (Government brief on appeal at 41.)

4 The government also offered GX 59-65 as "summaries regarding the EGA interactions
5 with the undercover operation" (Tr. 195) on various dates, and six of those seven charts indicated that
6 the cash derived from the fictitious invoices and EGA checks went to Groysman and Branfenbrener
7 or to Groysman alone. These charts were prepared at the direction of Ginzburg, and his testimony
8 provided the only foundation for their admission, despite the fact that "he had no personal knowledge
9 of many of the matters conveyed on those exhibits" (Government brief on appeal at 42)--which
10 suffered the additional "fundamental[]" flaws that they "contained inaccurate and misleading
11 information" and were, in any event, not the sort of "summary charts" whose admission is authorized
12 by the rules of evidence (id.).

13 Although the government argues that its introduction of the inadmissible evidence did
14 not affect Groysman's substantial rights because it was corroborated by other evidence, we do not see
15 in the record any corroboration (a) for the representations in five of those charts--GX 59, 60, 63, 64,
16 65--that Groysman received cash, or (b) for Ginzburg's testimony endorsing those exhibits for the
17 proposition that Groysman received cash. Each of those five charts showed Yuzovitskiy as giving
18 cash either to both Groysman and Branfenbrener or to Groysman alone. But Ginzburg never attended
19 one of their meetings and could not see inside those offices. And Yuzovitskiy testified that he did not
20 remember ever giving cash to Groysman. (See Tr. 958.)

21 Moreover, Ginzburg--though lacking first-hand knowledge--was adamant in testifying
22 that cash was received by Groysman in several instances in which other evidence suggested to the

1 contrary. For example, according to GX 60, Yuzovitskiy on March 2, 2010, gave cash to both
2 Groysman and Branfenbrener. Ginzburg admitted that there were "no video" and "no recordings
3 discussing" the handing of an envelope to Groysman on that day (Tr. 207); and we have seen no
4 indication in the record that a March 2 videotape was played for the jury. Nonetheless, Ginzburg
5 testified that cash was given to Groysman "based on the video and [his] monitoring." (Id. at 208.)
6 Further, he acknowledged that on that date "[a]n envelope was placed in the desk"; he testified that
7 both Groysman and Branfenbrener were "present, hence the description" of the cash as going to "both
8 of them." (Id.) Yuzovitskiy testified that he frequently put the cash in Branfenbrener's desk drawer.
9 Despite the fact that the envelope on March 2 was placed in a desk drawer, Ginzburg testified "I don't
10 believe it's misleading" to "suggest that it's actually going to the [sic] Lyubov Groysman." (Id.)

11 Similarly, GX 63 indicated that on April 29, 2010, cash went to both Branfenbrener
12 and Groysman. The video of that meeting, however, showed that Groysman was in the front room
13 of the EGA offices when the cash was being handed to Branfenbrener in a different room. (See
14 Tr. 250-53.) Ginzburg testified that he "[a]bsolutely" was "aware that Lyubov Groysman was not in
15 the back room where this transaction occurred." (Id. at 252.) But he testified that because the cash
16 was derived from an April 21 EGA check that had been given to Yuzovitskiy by Groysman, that
17 "context" meant that the cash, though handed to Branfenbrener, went to both Branfenbrener and
18 Groysman. (Id.)

19 So far as we have been able to determine from the record, only one of the charts in the
20 improperly admitted GX 59-65 group had any corroboration for its representation that Groysman was
21 given cash: GX 61 indicated that Grigory G. gave cash to Groysman on March 18, and indeed,
22 Grigory G. so testified, stating that when he said to Groysman "Take it. . . . It has this and that," his

1 phrase "this and that" referred to "[i]nvoice and cash" (Tr. 664). However, this testimony itself
2 lacked corroboration. To begin with, there was no substantiating video because, as Ginzburg
3 conceded, "the video on that date [wa]s pointed at the ceiling" (id. at 234). Thus, although Ginzburg
4 testified that he watched the video of what occurred at EGA that day, he conceded that he did not see
5 "any transaction where Lyubov Groysman receive[d] cash." (Id. at 233-34.) In addition, although
6 Ginzburg claimed to have had "personal knowledge" that cash was given to Groysman at that meeting
7 because he "heard it happen" (id. at 234 (emphasis added)), the audio transcript of the meeting does
8 not mention money or cash or the equivalent (see GX 2-10). Instead, the transcript reveals a
9 discussion of invoice errors and the prices of various items. Finally, although Ginzburg admitted at
10 trial that he knew who Groysman was on March 18--and plainly Groysman was known to Grigory G.
11 who called her his "partner[]" in crime--Ginzburg did not deny that some of his notes on the meeting
12 indicated that an envelope containing money had been handed to an "unidentified female." (Tr. 234
13 (emphasis added).)

14 The government argues that there was other evidence that Groysman at least had
15 knowledge of the DME scheme. Most of it was circumstantial. Yuzovitskiy testified that he and
16 Grigory G. began working with Groysman, Branfenbrener, and Leica in the DME scheme on the
17 recommendation of another coconspirator (see, e.g., id. at 790-93); Yuzovitskiy described a meeting
18 at EGA on February 5, 2010, in which he told Branfenbrener and Groysman what the real prices were
19 for whirlpools (see id. at 821-23); both Grigory G. and Yuzovitskiy testified that, in the scheme, they
20 received the go-bys and/or checks from Groysman (see id. at 659, 744-45); and Yuzovitskiy testified
21 that Groysman, though saying that she was not an owner or a boss and worked at EGA only part time,
22 said "'I am managing here. . . . I am managing for [Branfenbrener]'" (id. at 835 (quoting GX 2-11,

1 at 9); see also GX 2-11, at 1, 9 (indicating that "managing" in both instances was spoken in English)).
2 In addition to this circumstantial evidence as to Groysman's knowledge of the DME scheme, the
3 government points to direct evidence, consisting of Yuzovitskiy's testimony that he "ha[d]
4 discussions" with Groysman in which she asked him when he would deliver cash to EGA or Leica
5 (see Tr. 958-59). But the corroboration for that testimony too was sparse. For example, although
6 Ginzburg testified that all of the telephone conversations of the cooperators were recorded (see id.
7 at 49), the government has not cited to us to any telephone conversation in which Groysman asked
8 about cash, and points only to the transcript of the February 5, 2010 meeting. At the beginning of that
9 transcript, Yuzovitskiy is recorded as stating, in English, "Today is February fifth. Time--1:23. I am
10 going to EGA to bring it, uh, cash." (GX 2-4, at 2.) The transcript, using "LG" for Groysman, "VY"
11 for Yuzovitskiy, and "GB" for Branfenbrener, included the following, translated from Russian:

12 VY: Will you give me the money or not?... I am leaving.

13 LG: I am giving it. And when will you bring..?

14 VY: I gave it already.

15 LG: Yes?

16 GB: He gave it already.

17 (Id. at 4 (all ellipses in the transcript).) At trial, Yuzovitskiy testified that he "gave a yellow envelope
18 with the money to Branfenbrener" (Tr. 819), and his testimony about the above interchange was as
19 follows:

20 Q. Then the defendant states, "I am giving it. And when will you
21 bring-- And then you state, "I gave it already." On line 44 the defendant states,
22 "Yes." Branfenbrener states on line 45, "He gave it already."

23 What were the three of you speaking about in the last lines that I just
24 read?

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A. Before Lyubov Groysman was going to give me check, she asked me when I will bring the money which was owed previously.

Q. When you say "the money," what are you referring to?

A. We were talking about the cash and check.

Q. Is that the cash that we saw you handing in an envelope to Branfenbrener before this portion of the conversation?

A. Yes, sir.

(Id. at 822-23.) Thus, Yuzovitskiy testified that Groysman's words "When will you bring"--a question that ended without a spoken object--meant when will you bring "cash" or "money which was owed previously."

In sum, the government's evidence that Groysman's words and conduct showed that she knowingly participated in the DME scheme consisted principally of testimony by one cooperator that when Groysman asked "When will you bring" and did not specify any object to be brought, she meant cash, and testimony by the other cooperator that when he handed her something described as "ha[ving] this and that," she knowingly received cash. In light of the central role played by the evidentiary errors described above in the government's strategy, this evidence does not come close to defeating Groysman's claim of plain error.

Although the government argues that it did not emphasize the inadmissible evidence in its summation, in that it did not mention GX 59-65 and that it mentioned Ginzburg only once, we are unpersuaded in light of the record as a whole that the impact of Ginzburg's testimony, or of his misleading charts, was minimal. While GX 59-65 were not mentioned by name, the government told the jury that although Yuzovitskiy and Grigory G. were longtime "criminals" (Tr. 1306), their

1 testimony was corroborated by, inter alia, "documents" (id. at 1307). Those charts--pictorial and easy
2 to follow, generally showing only four or five boxes, connected by arrows indicating who gave
3 fraudulent documents, checks, and cash to whom--were likely to be more memorable to jurors than
4 the other documents, which consisted principally of lists of medical equipment on the go-bys and
5 fictitious invoices or the transcripts of the translated conversations.

6 And although the government mentioned Ginzburg in its summation only once, it did
7 so by telling the jury, "You can trust the testimony that came from Vadim Yuzovitskiy and
8 Grigory [G.]" in part because "every time they went into a meeting with one of the defendants, they
9 met with an agent before they went in, they met with an agent when they came out and you heard from
10 that agent. So you can trust that testimony." (Id. (emphases added).) While that was the only
11 mention of Ginzburg in the government's summation, we cannot ignore the fact that his testimony
12 constituted about 40 percent of the live evidence at trial. Testimony was presented on nine days;
13 Ginzburg testified on four of those days, and on the first three days of the trial, he was the only
14 witness.

15 We also note that because the conversations among the cooperators and the targets of
16 the investigation were conducted almost entirely in Russian, the jury was likely to accord special
17 deference to Ginzburg's interpretations of those conversations, given the government's elicitation at
18 the start of trial that Ginzburg's native language--and the language he still spoke at home and in social
19 situations--was Russian and that he had passed several governmental tests for translation between
20 Russian and English. When "a case agent also functions as an expert for the government, the
21 government confers upon him" an "aura of special reliability and trustworthiness," creating a "risk of
22 prejudice . . . that increases when the witness has supervised the case." United States v. Dukagjini,

1 326 F.3d at 53. Our unease in this regard is heightened in the present case by the facts that Ginzburg
2 "personally transcribed at least the final transcriptions" of these meetings (Tr. 60) and was allowed
3 at trial, over objection, to give interpretations as to what Yuzovitskiy and Groysman were discussing
4 in Russian, for example interpretations that went beyond what was in the English-translation
5 transcripts to which the parties had stipulated (see id. at 285-86). And some of Ginzburg's opinions
6 interpreted conversations and events as incriminating to Groysman even though those conversations
7 and events, as discussed above, were not recorded or were recorded but did not appear to inculcate
8 her.

9 In sum, the government has conceded that at Groysman's trial there were a large
10 number of erroneously admitted pieces of evidence inculcating Groysman, including the many
11 hearsay assertions by the government's main witness; the simple and easy-to-remember charts that
12 were prepared on the basis of hearsay, whose admission in evidence was not authorized by the rules
13 of evidence, and whose contents were inaccurate and misleading; and the impermissible opinion
14 evidence from the government's main witness whose views were likely to be given substantial
15 credence by reason of both his status as a law enforcement agent and his expertise in the language
16 spoken by Groysman and the cooperators. The sole witness who could testify from first-hand
17 knowledge in support of the government's contention that Groysman received cash from the present
18 fraudulent scheme was Grigory G., a longtime criminal who had continued his fraudulent activities
19 after escaping punishment in the past by assisting law enforcement authorities to convict others.
20 Grigory G.'s testimony that he gave cash to Groysman was not corroborated by the electronic
21 surveillance and was contrary to Ginzburg's debriefing notes; and Grigory G.'s uncorroborated
22 testimony was the sole admissible basis for Ginzburg's repeated hearsay testimony that Groysman

1 received cash at least once and for the government's reiteration of that assertion in summation. We
2 conclude that the evidentiary errors now conceded by the government were serious and central to the
3 prosecution's strategy; as such, they deeply undermine our confidence in the fairness and outcome of
4 Groysman's trial. The paucity of the government's other evidence, although not as central to our
5 decision, bolsters our conclusion that there was plain error.

6 Finally, at trial, the government told the jury that it could trust the testimony of the
7 longtime criminal cooperators because, inter alia, their testimony was corroborated by Ginzburg. (See
8 Tr. 1307.) On appeal, while confessing numerous errors in the admission of the testimony by
9 Ginzburg and the exhibits he had prepared, the government urges this Court to disregard those errors
10 because, inter alia, "Ginzburg's testimony about Groysman's role in the fraud was . . . corroborated
11 by . . . the cooperators" (Government brief on appeal at 48 (emphases added)). We can only conclude
12 that an affirmance of a conviction on the basis of such arguments, in the face of so many conceded
13 errors, would seriously affect the fairness, integrity, and public reputation of these judicial
14 proceedings.

15 CONCLUSION

16 We appreciate the government's candor in acknowledging the errors at trial. We have
17 considered all of the government's arguments in support of affirmance and have found them to be
18 unpersuasive. The judgment convicting Groysman is vacated, and the matter is remanded for a new
19 trial.